

30(b)(6) Luv N' Care (Joseph Hakim) - Vol. I

May 20, 2009

Monroe, LA

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1 exhibits B, C, and E of the complaint, is the
2 first use of the design or the product.

3 A. Okay.

4 Q. Okay?

5 A. Well, I can tell you that is was before
6 a particular date. I can't tell you the exact
7 date. I just don't have that information.

8 Q. Well, let's start with what you do
9 have.

10 A. And we don't have it in our system,
11 that's why they were never provided in the -

12 Q. So, you can't tell us exactly -

13 A. I can't tell you the exact date of the
14 very first use.

15 Q. Of any accused - I'm sorry, of any
16 asserted design?

17 A. I can't. I mean, I'm sure it's in our
18 - if we - I just don't know. I don't have it
19 from my stuff. The gripper style -

20 Q. That's exhibit B product? Soft spout?

21 A. Yeah. That is - that was prior to
22 2004. The sport sipper, which I think is C -

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1 Q. I think it's no spill.

2 MR. GUERRIERO: No spill is the -

3 A. Oh, what am I looking at?

4 Q. Oh, you've still got a couple of -

5 A. I still have more down here. I thought
6 I got rid of them all. I must have got more
7 documents from somebody else.

8 Q. I don't think we pulled them out.

9 A. Oh, okay. I had them pulled out of my
10 stack. The no spill? That was also - the first
11 sale was prior to 2004. And the hard and soft
12 comb and brush was prior to 2004.

13 Q. So, sitting here today then, the only
14 evidence that you have for when the first use of
15 any asserted design, any asserted Luv 'N Care
16 design, was 2004?

17 A. That's prior to 2004. That's all that
18 I have. That's all I have.

19 Q. Okay, I'm sorry, but you - as I
20 understand it, the information in front of you
21 shows that you were using it in 2004, and from
22 that, you conclude that you were using it prior

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1 to that time?

2 **A. Let me make sure that's in here.**

3 Q. I was using 2004 for all three, but if
4 we have to break them up, we can.

5 **A. That's okay. Let me look again and**
6 **see, so I don't - yeah, it was at least in 2004.**
7 **Now, maybe I should rephrase that and say not**
8 **before 2004.**

9 Q. And I want to make sure, my question is
10 not when did you start, because you already
11 established that you only know it was sometime
12 prior to 2004. My question is about evidence.
13 Sitting here today, the only evidence that you
14 have shows that you used the asserted Luv 'N Care
15 designs in 2004?

16 **A. That's all I have. I know it's at**
17 **least 2004 back. When we changed - we changed our**
18 **systems over, we don't have that data, that I**
19 **could go back before that.**

20 Q. Can you get it?

21 **A. No, I wasn't able to get it. That was**
22 **my problem. I could only go back to 2004.**

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1 Q. And no one at Luv 'N Care can get
2 information for -

3 A. No, I'm not the one that got this. I
4 had it got from anybody that could get it for me.

5 Q. But I want to know, is there anyone who
6 can get anything from earlier than 2004?

7 A. Not that I'm aware of.

8 Q. Okay.

9 A. Not at this time.

10 Q. So, then let's talk about - go back to
11 where we were before, which - was the email
12 conversion prior to 2004?

13 A. Yes, it was.

14 Q. And were the - I'm sorry, were the
15 graphics computers searched in connection with
16 this lawsuit?

17 A. Yes.

18 Q. What were they searched for?

19 A. Catalog sheets.

20 Q. Anything else?

21 A. In the graphics department?

22 Q. In the graphics computers you said.

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1 **A. Yeah, as well.**

2 **Q. Same thing?**

3 **A. Yeah, I think it was just catalog**
4 **sheets or any prior art for these products.**

5 **Q. What do you mean by prior art?**

6 **A. Packaging.**

7 **Q. Oh, prior art. Its got a specific**
8 **meaning - any previous art that was done?**

9 **A. There you go.**

10 **Q. All right, does Luv 'N Care keep**
11 **historical, previously done art that's associated**
12 **with the asserted products?**

13 **A. I don't think so. I don't think we're**
14 **able to find any. It would have been given to**
15 **the attorneys. It wouldn't have been given to**
16 **me, so -**

17 **Q. But you don't think that they were able**
18 **to find any?**

19 **A. I don't know.**

20 **Q. You don't know?**

21 **A. Because that would have been given to**
22 **the attorneys, and they would supplied it to you.**

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

-----x

LUV N' CARE, LTD. and)

ADMAR INTERNATIONAL, INC.,)

) CIVIL ACTION NO:

Plaintiffs,) 08-CIV 4457 (DC/HP)

vs.)

)

WALGREEN CO. and)

KMART CORP.,)

Defendants.) VOLUME II

-----x 2:29 PM

CONTINUED VIDEOTAPED 30(b)(6) DEPOSITION OF
LUV N' CARE, INC., THROUGH ITS DESIGNEE
JOSEPH HERMAN HAKIM. Taken before Joanne DeVito,
Shorthand Reporter and Notary Public in and for the
State of Florida at Large, pursuant to Notice of
Taking Deposition filed in the above cause.

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1 APPEARANCES:

2

3 JOE D. GUERRIERO, ESQ.

4 Luv N' Care General Counsel

5 3030 Aurora Avenue

6 Monroe, Louisiana 71201

7 Attorney for Plaintiffs

8

9 JASON R. BURATTI, ESQ.

10 Christopher & Weisberg

11 200 E. Las Olas Blvd.

12 Suite 2040

13 Fort Lauderdale, Florida 33301

14 Attorney for Defendant Walgreen Co.

15

16 ALSO PRESENT:

17

18 Nouri Edward Hakim

19 Jason Stapleton, Videographer

20

21

22

I N D E X

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2 JOSEPH HERMAN HAKIM PAGE

3 Direct Examination by Mr. Buratti 4

4

5 E X H I B I T S

6

7 DEFENDANTS' PAGE

8

9 Exhibit 55 1 page document bates nos. 203296 8

10 Exhibit 56 Document 8

11 Exhibit 57 Document 28

12

13 * Exhibits retained by counsel

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1 what's previously been marked as Exhibit 14. Do you
2 know what Exhibit 14 is?

3 **A Yeah. This is a list of sales by customer**
4 **for the year 2003 and -- let's see what the other**
5 **pages are. Yes, this one is only for 2003.**

6 Q Is it specific to what products were sold
7 by the customer?

8 **A This particular report is not.**

9 Q And is it specific -- so I can't tell from
10 that report if there's gripper cups sales?

11 **A Well, gripper sup -- gripper cup sales are**
12 **in this number --**

13 Q But --

14 **A -- it's not just gripper cup sales. Those**
15 **are in other reports that I gave.**

16 Q And can I tell what portion of sales in
17 Exhibit 14 are repeat versus initial sales?

18 **A This particular report only gives you the**
19 **total sales per customer in sales volume order for**
20 **the year of 2003.**

21 Q For all Luv N' Care products supplied to
22 that company?

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1 **A For all Luv N' Care products supplied to**
2 **that company. That's what this particular report**
3 **gives.**

4 Q Okay. I'm also going to hand you what's
5 previously been marked as Exhibit 15. There are
6 actually two documents in here together, but since
7 it's been previously marked, I'm going to leave it
8 this way for recordkeeping purposes. The documents
9 are LNC 190782 through 190828 and 190829 through
10 874. And I'm only going to ask you about the first
11 portion that I read, which is earmarked here.

12 In that first portion, what kind of
13 information is given?

14 **A Okay. Well, on the portion that you're**
15 **not asking me to look at has the heading of what it**
16 **is.**

17 Q Right.

18 **A So it took me a second to figure out what**
19 **you had actually handed me. This is a breakdown of**
20 **advertising allowance deductions taken by customers**
21 **against Luv N' Care.**

22 Q The second portion?

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1 **A The portion that you give -- the portion**
2 **that you asked me about, the first portion.**

3 Q The first portion is also advertising
4 allowance information?

5 **A It appears to me to be that, yes.**

6 Q It's not sales information?

7 **A No. This would be -- this would be**
8 **advertising. I wouldn't have run sales like this.**

9 Q Then I don't have any questions about that
10 document.

11 **A Good.**

12 Q I'm going to hand you exhibits labeled
13 Hakim 10, 11 and 13 that are part of Defendants'
14 Exhibit 30 in this case. My questions probably can
15 be answered generally, so I'm going to ask that
16 first and see if you can answer generally.

17 **A Okay.**

18 Q Can you identify in exhibits Hakim 10, 11
19 or 13 what sales are repeat sales?

20 **A Which sales are repeat sales?**

21 Q Yes.

22 **A Talking about at a consumer level?**

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1 Q Yes.

2 A No.

3 Q Does Luv N' Care have any information that
4 would show an initial versus a repeat sale for an
5 easy grip, hard and soft comb and brush?

6 A These documents as you see them cannot
7 give whether or not a consumer is buying a
8 repetitive product or not.

9 Q Can the McQuillen database generate such a
10 report?

11 A No, because the consumer doesn't buy
12 directly from Luv N' Care.

13 Q So then Luv N' Care has no -- no
14 information itself about what it -- what percentage
15 of the asserted products are sold in the initial
16 versus the repeat stage?

17 A Not from reports.

18 Q What about from other sources?

19 A Maybe personal knowledge, you know, maybe
20 by salespeople or talking with buyers or some
21 information that our buyers or our customers might
22 actually have with regards to their sales. That I

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1 can't answer, but I know that we do not have data in
2 our systems that differentiate between initial sale
3 and rebuy.

4 Q Has Luv N' Care documented its development
5 costs?

6 A Its direct development cost?

7 Q Yes.

8 A We have some expenses that may be itemized
9 out in our general ledger, but can I actually give
10 it to you by a specific item? Answer would be no.

11 Q Are you familiar with your brother Jack's
12 testimony that millions of dollars were spent
13 developing the asserted products in this case?

14 A I have not seen Jack's deposition nor was
15 I present for his deposition, so therefore, I do not
16 know what he's testified to.

17 Q Is it accurate to say that Luv N' Care has
18 spent millions of dollars designing the accused --
19 asserted products in this case?

20 A It's -- it's quite possible when you take
21 into account all of the -- the development time of
22 the engineers, the development time of the product

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1 **designers who worked with Ed trying to put Ed's**
2 **ideas onto paper. When you talk about mold cost and**
3 **test shots and SLA prototypes and things of that**
4 **nature, could you be over a million dollars? Yes.**

5 **Q Millions?**

6 **A Yes.**

7 **Q And that's just for the accused products**
8 **let alone the other products that Luv --**

9 **A I don't have a breakdown per item.**

10 **Q I'm going to mark Exhibits 55 --**

11 **A Are we through with these?**

12 **Q Probably. Which is a one-page production**
13 **document bearing production number LNC 203289.**

14 **A Okay.**

15 **Q And 56 which is a one-page document**
16 **production page bearing production number LNC**
17 **203296. Mr. Hakim, have you seen Exhibits 55 and 56**
18 **before?**

19 **A Yes.**

20 **Q What are they?**

21 **A They are schedules of our operating**
22 **expenses from our financial department.**

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1 Q Were they generated for this litigation?

2 A No.

3 Q They're normal documents reported at Luv
4 N' Care?

5 A That is correct.

6 Q Who -- who made these documents?

7 A These are prepared by our -- one of our --
8 by our outside CPA via associates.

9 Q Where does the information that's in these
10 Exhibits 55 and 66 come from?

11 A I'm sorry. Again.

12 Q Where does the information that's in
13 Exhibit 55 and 56 come from?

14 A From corporate records.

15 Q Is this information available for a time
16 period before 2004?

17 A This is 2009. I don't know. I don't
18 think so.

19 Q When would the information from prior to
20 2004 have become unavailable?

21 A I would have to look at our retention
22 policy and then check back with our accounting

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1 **department. It may be available and there again it**
2 **may not be available. I just don't know.**

3 Q What does the advertising line mean in
4 Exhibits 55 and 56?

5 A **That is direct advertising numbers that**
6 **the CPAs pulled off of checks.**

7 Q And is that the only money -- is that --
8 is that advertising inside the United States?

9 A **I would say all of this would be inside**
10 **the United States.**

11 Q All these numbers?

12 A **Now, I can't -- let me -- let me go back**
13 **on that. I'm not sure, but I think that it is only**
14 **inside the United States.**

15 Q How would you find out or confirm that it
16 was only U.S. advertising?

17 A **I would have to go back and look at the**
18 **trial balances.**

19 Q How was the money spent that's identified
20 in this line, the lines for advertising, Exhibits 55
21 and 56?

22 A **From this document I can't tell you.**

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1 Q What information would you need to know
2 how that money was spent?

3 A I would have to go back and look at the
4 trial balances.

5 Q At the checks?

6 A Excuse me. Checks or -- I would have to
7 look at the trial balances to find out what the
8 checks were.

9 Q And would that information also tell you
10 whether or not the money was spent on U.S.
11 advertising?

12 A That should tell me where the advertising
13 was done, yes.

14 Q And is this all of the money that Luv N'
15 Care directly spent on advertising from the years
16 2004 to 2007?

17 A Directly? I would -- I would have to -- I
18 would have to assume that this is correct, yes, as
19 being direct advertising.

20 Q And you're not sure if it was in the U.S.
21 or not?

22 A I feel quite confident that it is in the

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1 **U.S.**

2 Q Is there any information at Luv N' Care
3 about the amount of direct advertising monies spent
4 prior to 2004?

5 A I don't know. I pulled what I thought was
6 relevant. I don't even remember how far back I
7 went. Did I go back to 2004 in what I supplied you?

8 Q This is 2004, 55 and --

9 A No, no. I mean on the advertising
10 breakdown sheets that I gave you. That's what we
11 were looking at a second ago was part of a document
12 I supplied.

13 Q I can't say with any affirmative
14 certainty, but I don't think we've seen anything in
15 the case that predated 2004. It wasn't like a real
16 e-mail or something. But as far as reports
17 generated and documents retained by the company, it
18 appears that there's kind of a cut-off or a change
19 in 2003, 2004 time frame. So from that perspective,
20 I'm asking you if you know, you know, as a
21 custodian, a person knowledgeable about custodial
22 records and the like --

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1 **A Right.**

2 Q -- are there any records of advertising or
3 any other monetary expense recorded here in Exhibits
4 55 and 56 that predate 2004?

5 **A I'm sure we have some records that predate**
6 **2004.**

7 Q Would -- was that information searched for
8 relevant information in connection with this
9 lawsuit?

10 **A I don't truthfully remember if we searched**
11 **before 2004. It's my understanding 2004 forward was**
12 **the relevant term.**

13 Q Is that still your understanding today?

14 **A That's my understanding. I may be wrong,**
15 **but that's my understanding.**

16 Q But that was primarily what was searched
17 was information that postdated 2003?

18 **A Yes. A lot of our records didn't go back**
19 **pre 2004 because of the computer systems.**

20 Q So you're not aware of any evidence then
21 that supports that there were dollars spent, direct
22 advertising on the accused -- on the asserted

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1 designs prior to 2004?

2 **A** **Prior to 2004? I'm not sure. I'll have**
3 **to look. I've given you what I had which was a, I**
4 **believe, a larger number than these for these**
5 **periods on another sheet.**

6 **Q** **There's a lot of different costs here in**
7 **Exhibits 55 and 56. Are they apportionable to a**
8 **byproduct basis?**

9 **A** **How?**

10 **Q** **Can I -- can I apportion these costs --**

11 **A** **To a specific item?**

12 **Q** **Yes.**

13 **A** **No.**

14 **Q** **How would I go about figuring out which**
15 **portion of these costs is attributable to a sale of**
16 **an asserted product in this case?**

17 **A** **Well, a lot of these are general overhead**
18 **numbers, so those numbers are direct expenses. I**
19 **mean, they're indirect expenses. Direct expenses**
20 **we -- I think I provided that information showing**
21 **what the cost of the product was, what the cost was**
22 **to land the product, the duty, the brokerage fees,**

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1 the inland freight, the ocean freight, that type of
2 thing.

3 Q By provided, you mean to counsel?

4 A To counsel and I'm sure it was provided to
5 you. I would hope so.

6 Q Wasn't part of what you had at the
7 deposition the other day?

8 A No, I didn't bring it with me. Or did I?
9 If I brought it with me, you have it.

10 Q So then if I understand you correctly that
11 the information that's in Exhibits 55 and 56 is not
12 in other cost information that's been provided --

13 A Say it again now.

14 Q I'm just trying to figure out is, and
15 maybe you can help me --

16 A That's okay.

17 Q -- is is the cost information -- is the
18 direct operating expenses a -- that are in Exhibit
19 55 and 56 a portion of costs attributable to all of
20 Luv N' Care's product sales?

21 A Direct cost is a part of this schedule.
22 Is that what you're asking?

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1 Q Part of the schedule in Exhibits 55 and
2 56?

3 A Yes. Is that what you're asking me?

4 Q Show me that.

5 A Show you what?

6 Q Direct costs. These are all direct costs,
7 right?

8 A No. I didn't say these were all direct
9 costs.

10 Q Okay.

11 A Advertising is not a direct cost. Auto is
12 not a direct cost.

13 Q What kind of information is in Exhibits 55
14 and 56?

15 A It's a schedule of our operating expenses.

16 Q And are operating expenses part of Luv N'
17 Care's regular business activities?

18 A Yes.

19 Q Are they paid out of profits from Luv N'
20 Care's sales of product?

21 A They're paid out -- paid out of proceeds.

22 Q Paid out of proceeds? So it's fair to say

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1 that the information in Exhibits 55 and 56 is in
2 part a cost associated with the asserted products in
3 this?

4 **A That is correct.**

5 Q How can I go about figuring out what of
6 the costs in Exhibits 55 and 56 are apportionable to
7 the products in suit?

8 **A You have to do it by percentages.**

9 Q What percentage of products were gripper
10 cups in 2005, products sold by Luv N' Care were
11 gripper cups in 2005?

12 **A We're going to have to -- these are the**
13 **documents that I brought actually. They're here if**
14 **you want me to calculate them, but I mean --**

15 Q That's how you would do it?

16 **A -- it's a waste of time. Yes.**

17 Q Okay. And for 2006, 2007, the same thing?

18 **A Yes.**

19 Q From the -- and you're referring to the
20 exhibits that are Hakim 11 and 13?

21 **A Ten, 11 and 13.**

22 Q Ten, 11 and 13, right.

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1 **A** **As well as the other one that you gave me**
2 **that had the total sales of all product. You would**
3 **take and get a percentage of these against the total**
4 **sales.**

5 **Q** **For year-by-year basis?**

6 **A** **Right.**

7 **Q** **So I would need a 2004 -- on any given**
8 **year I need the sales document that's Hakim 11, 13**
9 **or 10 from Exhibit 30 and a total year's sales of**
10 **all Luv N' Care products of all of its customers to**
11 **figure out the relative percentage of product?**

12 **A** **Yes.**

13 MR. BURATTI: Okay. Let's go off the
14 record for a minute.

15 THE VIDEOGRAPHER: 2:49. Off the record.
16 (Informal discussion off the record.)

17 THE VIDEOGRAPHER: 2:54. Back on the
18 record.

19 BY MR. BURATTI:

20 **Q** **Earlier we were discussing some 200,000**
21 **blogs that apparently are out there about Nuby's**
22 **asserted products in this case?**

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1 **A** **Yes.**

2 **Q** Is that right, that information?

3 **A** **Actually, it's not necessarily 200,000**
4 **blogs. It's 2 million 100 and some-odd thousand**
5 **contacts -- or not contacts. I'm trying to use the**
6 **right term here because blogs were not the right**
7 **term. Blogs is a portion of that. But different**
8 **people talking about, or different individuals,**
9 **eBay, whatever, selling Nuby products, talking about**
10 **Nuby products. Even saw one video where a**
11 **consumer -- never heard of her or seen of her**
12 **before -- she actually did a video on a sippy cup,**
13 **on a Nuby sippy cup. So that's how much**
14 **communication is out there. I ran -- it was done on**
15 **a Google search and what I did was to try to get as**
16 **close to the pure Nuby products as I could, I**
17 **excluded, you know, you did Nuby but exclude --**
18 **there was a -- there's some kind of painting out**
19 **there that refers to Nuby, or an artist. There's a**
20 **couple different things. So I tried to exclude all**
21 **those to get as close to all Nuby stuff as I could**
22 **get. So I came up with a million 100 and some-odd**

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1 **thou -- 2 million 100 and some-odd thousand**
2 **references. I mean, even if it's, you know, has a**
3 **hundred thousand incorrect ones, then you're still**
4 **around a couple of million.**

5 Q And that's what we were talking about by
6 the blogs that -- that Ed was referring to?

7 A **Yeah. Eddie -- Eddie used the word blog,**
8 **but like he said, he's not really that computer**
9 **savvy. He just made a mistake on the term.**

10 Q That's what I just wanted to clear up --

11 A **Yeah.**

12 Q -- and that's what --

13 A **There are -- there may be a couple hundred**
14 **thousand blogs. I couldn't go through and count.**
15 **That's just too much to do. But, I mean, there's a**
16 **lot out there. I mean, it's, you know, a lot of**
17 **blogs, a lot of -- I guess they're blogs. People**
18 **like ZRecs and things like that. Z Recommends. You**
19 **know, people like that out there who look at**
20 **different people's products and make recommendations**
21 **and things of that nature.**

22 Q Anything else? That's meant by the blogs

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1 as we were discussing --

2 **A I think that's generally it.**

3 Q Do you have any person knowledge about any
4 actual blogs that talk about, or tout the overall
5 appearance of the asserted products in this case?

6 **A I don't know of any IP sites that would do**
7 **that, no.**

8 Q Any sites at all.

9 **A Well, I mean, who else would do it but an**
10 **IP site? I don't know of a consumer in the world**
11 **who concerns themselves with the secondary meaning**
12 **of a product or anything.**

13 Q I am waiting for one more page that I want
14 to ask you about. I'm going to try to describe it
15 and see if you can answer the question --

16 **A Okay.**

17 Q -- without having to wait.

18 **A Okay.**

19 Q There's a printout that I've seen that
20 shows Wal-Mart sales by a geographic region. Are
21 you familiar with that document?

22 **A Yeah. I got it prepared.**

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